Supreme Court, U.S.
FILED
APR 18 2007
OFFICE OF THE CLERK

Nos. 06-969 and 06-970

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

WISCONSIN RIGHT TO LIFE, INC.

SENATOR JOHN MCCAIN, ET AL., APPELLANTS

v.

WISCONSIN RIGHT TO LIFE, INC.

ON APPEALS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. Appellee's as-applied challenge is moot 1
B. Appellee's argument is fundamentally inconsistent with this Court's decision in *McConnell* v. *FEC* 4
C. Appellee's reliance on *MCFL* is misplaced 12
D The district court erred in refusing to consider evidence outside the four corners of appellee's ads 13
E. Appellee offers no sound reason for this Court to reconsider *McConnell* 18

TABLE OF AUTHORITIES

Cases:

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) 5
Brown v. *Socialist Workers' 74 Campaign Comm.*, 459 U.S. 87 (1982) 13
FEC v. *Beaumont*, 539 U.S. 146 (2003) 5, 10
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 2, 12, 13, 14
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 10
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 3
McConnell v. *FEC*:
540 U.S. 93 (2003) ..... *passim*
251 F. Supp. 2d 176 (D.D.C. 2003) 8
Randall v. *Sorrell*, 126 S. Ct. 2479 (2006) 18
Storer v. *Brown*, 415 U.S. 724 (1974) 2
Wisconsin Right to Life, Inc. v. *FEC*, 546 U.S. 410 (2006) 4

Statute: Page

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 91 ..... *passim*

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

A. Appellee's As-applied Challenge Is Moot

The Commission's opening brief explains (at 21-25) that this case is moot because (1) no live controversy exists with respect to the specific ads that appellee proposed to run in 2004, and (2) appellee has neither alleged nor demonstrated an intent to run ads having the characteristics that the district court found dispositive for purposes of the constitutional analysis. Appellee contends (Br. 28) that, for purposes of the "capable of repetition, yet evading review" exception to general mootness principles, "[t]he alleged illegal action will recur when [appellee] wishes to run a targeted broadcast ad mentioning a candidate within the prohibition period," whether or not the future ad is otherwise comparable to the ads that are the subject of this suit. That is incorrect.

Appellee has brought and preserved an as-applied challenge to the application of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91, to three specific ads. In upholding that challenge, moreover, the district court articulated a test that focused on the text of the ads and implied that the statute would be valid as applied to ads that differed in their particulars, for example, by promoting or attacking a candidate. See J.S. App. 22a. Accordingly, appellee must show that the "same controversy" will recur. See Gov't Br. 22-24. A vague intent to broadcast ads subject to BCRA § 203 does not suffice.

If appellee had alleged and demonstrated an intent to engage in *express advocacy* during a future pre-election period, that prospect would not give rise to the same controversy that is presented here. Appellee is therefore wrong in arguing (Br. 28) that the "capable of repetition" prong of the exception

can be satisfied simply by evidence that appellee "wishes to run a targeted broadcast ad mentioning a candidate within the prohibition period." That general averment might be enough if this case involved a *facial* challenge, since such evidence would demonstrate appellee's continuing practical interest in the question whether BCRA § 203 can be enforced *at all*. Evidence at that level of generality, however, is insufficient to establish the requisite ongoing case or controversy with respect to the as-applied challenge presented here.

Appellee notes (Br. 26 n.32) that this Court in *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974), while acknowledging that the "capable of repetition, yet evading review" exception is "typical[ly]" implicated only in facial challenges, held that the doctrine can be invoked in as-applied challenges. The doctrine's invocation in as-applied challenges remains the exception rather than the rule, however, precisely because an as-applied challenge is more likely to turn on factors particular to a specific application of the statute, making it unlikely that the "same controversy" will recur. Moreover, the nature of the as-applied challenge will affect the likelihood of such a recurrence. For example, while the as-applied challenge in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251-263 (1986) (*MCFL*), arose in the more traditional enforcement context and therefore posed no mootness problem, the challenge there, which turned on the nature of the organization rather than on the content of particular ads, was relatively likely to recur. An organization's structure and willingness to accept corporate contributions may not change from election to election, but the nature of ads concerning a diverse range of public issues that may gain salience during future elections almost certainly will change. In light of the number of forms that future ads could take—from avoiding invoking a candidate's name altogether to criticizing the candidate

directly, or even including express advocacy—it is purely speculative that the same controversy will recur.

In addition to its as-applied challenge with respect to three specific ads, appellee also brought a broader challenge to BCRA's application to so-called "grassroots lobbying." While that broader challenge might have been more likely to recur, the district court found it non-justiciable on other grounds, see J.S. App. 15a-16a, and appellee did not cross-appeal that ruling. Having declined to cross-appeal, appellee cannot invoke its general interest in continuing to engage in grassroots lobbying to keep alive a controversy that is limited to three ads that will almost certainly never run again. Subsequent issues may arise in close proximity to a future election; in addressing those issues, appellee may decide it is necessary to refer to a candidate in the election, and it may further decide to use a targeted broadcast ad. But adding the further speculation that those ads will share the same textual features that the district court found dispositive here is far too speculative. Under these circumstances, the as-applied challenge that appellee has brought and preserved is moot and does not fall within the exception for cases capable of repetition yet evading review.[1]

---

[1] Appellee also relies (Br. 27-28) on the Court's conclusion that the issue in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), was capable of repetition yet evading review. But the differences between this case and *Bellotti* are revealing. The challenge in *Bellotti* did not turn on the text of the particular ads, but was directed at the complete ban on corporate participation in most referenda campaigns. See *id.* at 767-770. Any effort by the corporations to take part in the next tax referendum—through any kind of ad in any medium—would have triggered the ban. Moreover, the plaintiffs in *Bellotti* were explicit about their continued interest in participating in elections. Here, by contrast, appellee's challenge is premised on a lack of intent to influence elections as such. Appellee's stated interest is in legislative issues that may or may not arise in close conjunction with candidate campaigns. It is speculative whether appellee's desire to address such issues will prompt it to run ads that

B. Appellee's Argument Is Fundamentally Inconsistent With This Court's Decision In *McConnell* v. *FEC*

In *McConnell* v. *FEC*, 540 U.S. 93 (2003), this Court held that BCRA § 203 is constitutional on its face, 540 U.S. at 203-209, and the Court indicated that the financing restrictions imposed by that provision are valid at least in the "vast majority" of their applications, see *id.* at 206. Although this Court subsequently clarified that *McConnell* did not foreclose as-applied challenges, see *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 411 (2006) (*WRTL I*) (per curiam), the Court in *WRTL I* did not cast doubt on any aspect of *McConnell*'s reasoning. Appellee's argument in support of its as-applied challenge is fundamentally inconsistent with this Court's analysis in *McConnell*.

1. Appellee asserts (Br. 29) that "this case involves a *prohibition* that substantially burdens the people's rights to self-government using their liberties of expression, association, and petition" (footnote omitted). The Court in *McConnell* explained, however, that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance ads expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." 540 U.S. at 203; see Gov't Br. 3-4. The Members of this Court divided on the question whether Congress's authority to regulate corporate campaign spending encompasses "electioneering communications," as defined in BCRA, when those ads do not contain express electoral advocacy. An unchallenged premise of the Court's decision, however, was that Congress has greater power to regulate corporate electoral spending than to regulate comparable advocacy by individuals or unincorporated entities. Appellee's effort (*e.g.*, Br. 1) to

---

trigger BCRA, let alone ads that share the textual features that the district court found dispositive here. See Gov't Br. 24-25.

analogize BCRA § 203 to past restrictions on the speech of individuals is therefore misconceived.

Appellee's characterization (Br. 29) of BCRA § 203 as a "*prohibition*" on speech is, to use the Court's words in *McConnell*, "simply wrong." As the Commission's opening brief explains (at 7), corporations are permitted under BCRA (as under prior law) to finance electoral advocacy through a separate segregated fund, commonly known as a political action committee or PAC. The Court in *McConnell* therefore observed that "it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." 540 U.S. at 204 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). The Court in *McConnell* further explained that "corporations and unions may finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. Although appellee contends (Br. 33-35) that the PAC alternative is burdensome and inadequate, it makes no effort to reconcile that position with the *McConnell* Court's evident conclusion that the availability of that option substantially affects the constitutional analysis.

2. Appellee's arguments are inconsistent with *McConnell* at more fundamental levels as well. Based on an extensive evidentiary record, the Court in *McConnell* concluded that the "vast majority" of pre-BCRA ads falling within the statutory definition of "electioneering communication" had an "electioneering purpose." 540 U.S. at 206.[2] The Court re-

---

[2] The Court also noted that, "whatever the precise percentage may have been in the past," corporations and unions that do not seek to affect electoral results can adjust their advertising practices to BCRA's requirements by "simply avoiding any specific reference to federal candidates." *McConnell*, 540 U.S. at 206. The Court's evident expectation was that, now that BCRA is in

jected the plaintiffs' overbreadth challenge to BCRA § 203 and concluded that, "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion." 540 U.S. at 207. Obviously, any constitutional exemption from BCRA § 203 that encompasses a substantial percentage of ads falling within the statutory definition of "electioneering communication" would be irreconcilable with this Court's determination that BCRA § 203 is valid in the "vast majority" of its applications.

But appellee's proposed test, like that adopted by the district court, would have precisely that forbidden effect. Appellee does not demonstrate that its own ads are atypical of "electioneering communications" generally, or that the exemption it seeks would encompass only an insubstantial percentage of communications falling within the statutory definition. To the contrary, appellee's own ads, as well as the broader class of ads that appellee seeks to exempt, closely resemble ads that the Court in *McConnell* identified as *paradigmatic* abuses under pre-BCRA law.[3]

---

effect, an *even larger* percentage of ads falling within the statutory definition of "electioneering communication" will reflect an electoral purpose.

[3] Of course, the *clearest* example of an election-oriented ad is one that expressly advocates the election or defeat of an identified candidate. At the time of BCRA's enactment, however, "very few ads—whether run by candidates, parties, or interest groups—used words of express advocacy. In the 1998 election cycle, just 4% of candidate advertisements used magic words; in 2000, that number was a mere 5%." *McConnell*, 540 U.S. at 127 n.18 (citations omitted); see *id.* at 193 & n.77. Thus, the fact that appellee's ads contained no express electoral advocacy does not take them out of the heartland of Congress's concern. As the *McConnell* Court clearly recognized, the fact that the "express advocacy" test failed to capture the large majority of candidates' *own* ads made it woefully underinclusive. But as amici League of Women Voters, et al., explain (Br. 15-25), appellee's proposed test would allow corporations to

As a core example of the types of ads that had been used to circumvent pre-BCRA restrictions on corporate electioneering, the Court described a hypothetical ad that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. Appellee's ads differ from the "Jane Doe" hypothetical only in that those ads, rather than explicitly condemning Senator Feingold's record on the issue of judicial filibusters, criticize a "group of Senators" (see J.S. App. 67a, 69a), which many listeners would know included Senator Feingold, and direct viewers and listeners to a website that makes that link explicit and contains such criticisms. See Gov't Br. 45. Under appellee's proposed constitutional test, moreover, a purported "issue ad" can be exempt from BCRA § 203 even if the ad itself explicitly criticizes a candidate's position. See Appellee Br. 56-57.[4] Because the constitutional exemption that appellee advocates would encompass a *substantial percentage*—probably the vast major-

---

run ads that are functionally equivalent to some of the most famous and effective *candidate* ads ever produced.

[4] Appellee contends that BCRA § 203's financing restrictions cannot constitutionally be applied to an ad that (1) "focuses on a current legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter in his or her official capacity"; and (2) "does not mention any election, candidacy, political party, or challenger, or the official's character, qualifications, or fitness for office." Appellee Br. 56 (footnote omitted). Appellee states that, so long as those criteria are satisfied, the ad is entitled to a constitutional exemption even if it "states the position of the candidate on the matter * * * and praises or criticizes the candidate for that position." *Id.* at 57. Appellee asserts (*id.* at 56 n.66) that, because its proposed constitutional test requires a reference to a "current" legislative matter, the test is consistent with the *McConnell* Court's recognition that the "Jane Doe" ad had an electioneering purpose. The Court in *McConnell*, however, did not describe the "Jane Doe" ad as referring to a stale legislative issue, let alone suggest that this was the only feature that marked the hypothetical ad as election-oriented.

ity going forward—of ads falling within BCRA's definition of "electioneering communication," including ads indistinguishable from the Court's "Jane Doe" example, it cannot be reconciled with the *McConnell* Court's rejection of plaintiffs' facial challenge to BCRA § 203.[5]

Moreover, the inconsistency between appellee's position and the Court's conclusion in *McConnell* that the "vast majority" of BCRA § 203's applications are valid becomes even clearer when the prospective effects are considered. In *McConnell*, the Court recognized that, due to the bright-line nature of BCRA's definition of "electioneering communication," corporations interested in running "pure issue ads" could avoid the application of BCRA § 203 prospectively. See 540 U.S. at 206-207. Conversely, any bright-line "magic feature" exception, like the district court's, that places no weight on contextual indicators of electioneering purpose would open the door for massive circumvention of BCRA's financing restrictions. The Court's experience with the "express advo-

---

[5] Appellee places substantial weight on the alleged similarities between the ads at issue here and an ad that appellee refers to as the "PBA ad," which was mentioned by the district court in *McConnell* but was never addressed by this Court. Contrary to appellee's contention (Br. 56), the "PBA ad" is not a "logical prototype" for an as-applied constitutional exemption. The much more logical prototype for consideration of appellee's as-applied challenge is the "Jane Doe" ad that was specifically referenced in this Court's opinion, which the Court clearly understood to have an electioneering purpose. If anything, the PBA ad is an example of ads that serve more than one purpose and was difficult to classify under a binary methodology. Two defense witnesses in *McConnell*, asked to consider the text of the "PBA ad" without reference to context, expressed differing views about whether the ad was *primarily* electoral or *primarily* legislative. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.); *id.* at 748 (Kollar-Kotelly, J.). Neither witness opined that the ad wholly lacked an electioneering component. Now that BCRA is on the books, corporations that intend to influence both elections and issues can either avoid the temptation to link the issue to an identified candidate or finance the ad through a PAC.

cacy" test amply demonstrates the willingness and ability of corporations and unions to take advantage of loopholes or underinclusive bright-line rules. Going forward, the "vast majority" of ads with an electioneering purpose and effect could be designed to fall within the as-applied exceptions recognized by the district court and proposed by appellee. That would clearly turn *McConnell* on its head.

3. Based on a voluminous record, the Court in *McConnell* rejected the plaintiffs' overbreadth challenge. Despite that holding, appellee argues (*e.g.*, Br. 29, 32, 33) that the government bears the burden of proving the electoral focus of the specific ads at issue here. By contending that the application of BCRA § 203's financing restrictions to particular "electioneering communications" cannot be treated as presumptively constitutional, appellee argues in effect that its as-applied challenge should be adjudicated as if *McConnell* had never happened. The Court surely did not intend that its analysis and holding in *McConnell* would be disregarded in such a manner.

It is also unclear *how* the government could satisfy its burden under appellee's theory of the case. Until Congress enacted BCRA's "electioneering communications" provisions, which identify specific objective criteria that indicate electoral intent and effect, this Court had addressed potential vagueness concerns by construing prior campaign-finance laws as reaching only express electoral advocacy. See *McConnell*, 540 U.S. at 190-192. The Court in *McConnell* made clear that "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law," *id.* at 190, and that Congress may adopt a different standard so long as its test is neither vague nor overbroad, see *id.* at 192. But if the government in each as-applied challenge must prove the electioneering character of the particular ad at issue, without reference to the congres-

sional judgment reflected in BCRA's definition of "electioneering communication" and without reintroducing vagueness concerns, it is difficult to see what standard *other than* the "express advocacy" test a reviewing court could employ. Adoption of appellee's proposed approach would therefore effectively negate this Court's holding in *McConnell* that Congress's power to restrict corporate electioneering extends beyond regulation of express advocacy.

4. Appellee appears to contend (*e.g.*, Br. 59-61) that, because of the importance of "grassroots lobbying" to a functioning democracy, BCRA § 203 cannot constitutionally be applied to appellee's ads even if those ads were intended to influence federal elections. That claim is also foreclosed by *McConnell*. Corporate electioneering has historically been subject to greater restrictions than other corporate speech, not because speech concerning candidate elections is entitled to reduced constitutional protection, but because corporate electoral advocacy poses distinct dangers to the democratic process. See *McConnell*, 540 U.S. at 115-117, 205; accord, *e.g.*, *Beaumont*, 539 U.S. at 152-156; *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208-209 (1982). The interest in preventing corporate wealth from exercising untoward influence on candidate elections has consistently been recognized as compelling, see *McConnell*, 540 U.S. at 205, and it is not diminished by the fact that a particular effort at electoral influence also contains a "grassroots lobbying" component. See *id.* at 206 ("The justifications for the regulation of express advocacy apply equally to [issue] ads aired during [the 30- and 60-day pre-election] periods if the ads are intended to influence the voters' decisions and have that effect.").

5. Appellee contends (Br. 45-46) that effective "grassroots lobbying" requires that an ad name the candidate to whom constituents' communications should be addressed, and that BCRA § 203 therefore renders corporate "grassroots lobby-

ing" infeasible during the 30- and 60-day pre-election periods. That argument is not new. In *McConnell*, various plaintiffs similarly contended that BCRA's "electioneering communications" provisions are unconstitutional because BCRA's definition of that term would encompass ads urging citizens to contact their elected representatives regarding pending legislative issues. See, *e.g.*, Br. of AFL-CIO at 19 (No. 02-1755); Br. of Senator Mitch McConnell et al. at 50-52 (No. 02-1674 et al.). In response to the government's contention that effective issue advocacy does not require references to specific candidates, the AFL-CIO's reply brief in that case relied (at 2-3) on testimony from the organization's public affairs director that "naming a federal *officeholder* * * * in broadcast advertisements is often necessary in order effectively to influence his or her conduct and the issue debate."

Despite those arguments, this Court held in *McConnell* that any overbreadth in the statutory definition of "electioneering communication" was unproblematic because, *inter alia*, an advertiser who does not seek to influence federal elections "may finance genuine issue ads during [the pre-election] timeframes by simply avoiding any specific reference to federal candidates." 540 U.S. at 206. The Court thus evidently concluded that, at least as a general matter, omission of references to identified federal candidates will not preclude effective issue advocacy. Because appellee does not contend that its own circumstances were unique in that respect—*i.e.*, that appellee had a *particular* need to identify Senator Feingold in its broadcast ads—appellee's argument adds nothing to what was before this Court in *McConnell*. Moreover, the reality that other organizations' efforts to engage in grassroots lobbying on the filibuster issue outside the context of pending candidate elections did *not*, in fact, refer to specific federal officeholders, J.A. 45-46, underscores that the Court's conclusion in *McConnell* is fully applicable here.

6. Appellee contends (Br. 47-48) that Congress might have employed the "less restrictive means" of requiring "electioneering communications" to be financed from a "segregated bank account" containing only funds raised from individuals, rather than from a PAC (which is subject to additional restrictions). Appellee did not finance the ads at issue here through such an account, however, and instead used substantial donations from business corporations. See Gov't Br. 11. Appellee's contention that Congress ought to have made the segregated-account alternative available is therefore irrelevant to the question whether BCRA § 203 is constitutional as applied to appellee's own conduct. For that reason, appellee is not even in a position to advance the argument urged by a number of its amici that the Court should strike down BCRA § 203 in favor of the segregated-account approach. In any event, Congress chose to require nonprofit corporations other than "*MCFL* organizations" (see Gov't Br. 4-5) to finance "electioneering communications" through a PAC. Congress specifically rejected the alternative that appellee proposes, and this Court upheld that choice in *McConnell*. See 540 U.S. at 209-211.

C. Appellee's Reliance On *MCFL* Is Misplaced

Appellee states (Br. 43) that "this case is like" *MCFL*, in which the Court held that a narrowly defined class of nonprofit corporations (see Gov't Br. 4-5) were entitled to a constitutional exemption from the federal ban on the use of corporate treasury funds to finance express electoral advocacy. Appellee's reliance on *MCFL* is misplaced.

Appellee suggests (Br. 42-43) that the Court in *MCFL* placed on the government the burden of establishing that the challenged financing restriction was constitutional as applied to MCFL's communications. As the Commission's opening brief explains (at 34-35), *MCFL* in fact stands for the opposite

proposition. The Court in *MCFL* stated that it would "not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not kind," and it sustained the organization's as-applied challenge only after concluding that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." 479 U.S. at 263. Far from requiring the government to establish the law's validity as applied to a particular entity, the Court required MCFL to show that its campaign spending would *not* implicate the concerns at which the challenged statutory provision was addressed.

Appellee relies in particular (Br. 43, 49) on this Court's statement in *MCFL* that "the desire for a bright-line rule" was not a sufficient justification for declining to recognize a constitutional exception to the statutory ban on corporate express advocacy. See 479 U.S. at 263. But the Court made that statement only *after* finding that MCFL posed *none* of the concerns that motivated the statutory prohibition, and the Court made clear that it would uphold the bright-line approach if the difference were a matter of degree, not kind. Taken as a whole, the Court's opinion in *MCFL* establishes that appellee bears the burden of showing that there exists a class of "electioneering communications" for which electoral intent and effect are demonstrably lacking, and that its own ads fall within that category. Cf. *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (allowing as-applied challenge for "minor political party that can show" atypical hardship from compelled disclosures).

D. The District Court Erred In Refusing To Consider Evidence Outside The Four Corners Of Appellee's Ads

Contrary to appellee's suggestion (Br. 36), the government does not advocate "an intent-and-effect test warranting a broad contextual investigation into the speaker's alleged

true purpose." The Commission's opening brief explains (at 19, 42-43) that, in light of the difficulties inherent in an unstructured post hoc inquiry into an advertiser's likely purpose, courts should adhere as closely as possible to the bright-line definition of "electioneering communication" that Congress adopted. Because appellee bears the burden of showing that Congress's generalization is inaccurate with respect to appellee's own ads—*i.e.*, that those ads demonstrably *lack* an electioneering purpose—appellee cannot prevail on the theory that electoral intent is unknowable. See Gov't Br. 42.

In any event, appellee, like the district court, is wrong to posit a stark choice between an inquiry strictly limited to the text of the ads and a full-blown and far-reaching inquiry into intent. That is a false dichotomy. It ignores a reasonable middle ground that this Court itself has repeatedly invoked in its campaign-finance decisions—viz., a focused and limited consideration of not just text, but context. Among the most important contextual features is the timing of an ad vis-a-vis an election. Not only is that contextual factor central to BCRA's definition of "electioneering communication," but this Court in *McConnell* pointed to the timing of so-called issue ads pre-BCRA—almost all within 60 days of an election—as "confirm[ing]" the Court's "conclusion that such ads were specifically intended to affect election results." 540 U.S. at 127. In other contexts as well, the Court has pointed to contextual factors in applying the campaign-finance laws. In *MCFL*, for example, the Court relied on the extraordinary circulation of the voter guide at issue to conclude that it did not qualify as an internal newsletter. 479 U.S. at 250-251.

1. This case does not require the Court to fashion a general standard for assessing as-applied constitutional challenges to BCRA § 203, or to adopt a test that makes any particular contextual factors determinative. Indeed, the primary

relevance of the strong contextual indications of electioneering purpose here is to make clear that any tests—like those adopted by the district court and proposed by appellee—that exempt ads without regard to such contextual indications will open up the statute to massive circumvention. See pp. 17-18, *infra*. In any event, three readily administrable contextual factors weigh strongly against appellee's as-applied challenge here.

First, the ads' specific and repeated cross-reference to a website that explicitly criticized Senator Feingold's position on judicial filibusters is relevant to this as-applied constitutional challenge.[6] That is particularly true here because the "BeFair.org" website was the only source referenced in the

---

[6] The Commission's opening brief explains (at 43-45) that appellee's ads repeatedly urged viewers and listeners to visit the "BeFair.org" website, which contained materials disparaging Senator Feingold's record on the issue of judicial filibusters. That brief observes (at 44) that "[a] court could not cogently assess the likely purpose and effect of a broadcast advertisement urging viewers to 'look at the billboard on Main and First Streets' without examining the billboard's message." Although appellee does not specifically address that hypothetical, the logic of its position suggests that the court in an as-applied challenge involving a broadcast ad that cross-referenced such a billboard should ignore the billboard's content. See Appellee Br. 58 n.68. Of course, the position of the district court is even more ambitious because it treats the absence of language from the ad itself as an affirmative virtue, see J.S. App. 22a-23a, but then would ignore the fact that the thrice-referenced website supplies the missing language. Appellee contends (Br. 58 n.68) that its own ads are analogous to ads that simply urge individuals not to vote until they have visited a website that discusses candidates' positions on issues of concern. But unless a broadcast ad itself refers to a clearly identified candidate for federal office, it does not fall within the statutory definition of "electioneering communication," and a court will have no occasion to decide whether BCRA § 203 is constitutional as applied, regardless of what non-broadcast communications the ad references. Likewise, if appellee had avoided the reference to Senator Feingold and had directed listeners and viewers to visit its website to find out how to stop the filibusters, it would have avoided the application of BCRA § 203 altogether.

ads that provided contact information for the Senators, even though such information is a logical component of any grassroots lobbying ad. Second, it is relevant that appellee itself, during the same election cycle, had opposed Senator Feingold's reelection and had identified filibusters as a campaign issue.[7] Third, just as the proximity of ads to elections provides contextual evidence of an electioneering purpose, the timing of appellee's ads vis-a-vis legislative votes undermines appellee's claim of a lobbying rather than electoral motive.[8]

---

[7] As Judge Roberts's dissent in the district court explained, appellee had "made the defeat of [Senator] Feingold a priority" during the 2004 election cycle; had "endorsed through its PAC three of Senator Feingold's main opponents"; and had treated "Senator Feingold's participation in judicial filibustering" as "a particular focus of criticism." J.S. App. 41a-42a (internal quotation marks omitted). That pattern of advocacy does not wholly foreclose the possibility that appellee could run a different ad that named Senator Feingold but was not intended to influence the election. Appellee's sustained opposition to Senator Feingold's reelection effort, however, is directly relevant to the determination whether appellee has proved the absence of electioneering intent with respect to the ads at issue here.

[8] Appellee began its advertising campaign shortly after the Senate had departed for a lengthy recess, and it did not resume its anti-filibuster ads after the 2004 election, even though the issue gained even greater public prominence during the first half of 2005. See Gov't Br. 45-46. It is undisputed that no judicial filibuster votes occurred between the commencement of appellee's advertising campaign and the 2004 general election. See J.A. 30. Although appellee asserts that additional filibuster votes were anticipated during the fall of 2004 (Br. 15 & n.24), the evidence indicates that the timing of the ads was determined well in advance without reference to the legislative schedule (see Gov't Br. 11 n.3), and the district court made no effort to determine whether the ads were reasonably timed to achieve their purported lobbying objective. Appellee further contends (Br. 16) that "there was no reason for [it] to run ads" during early 2005 because the relevant issue then was whether Senate rules should be changed, not whether Wisconsin's Senators should support individual filibusters. But appellee used *non-broadcast* communications in March 2005 to encourage supporters to "contact Senators Kohl and Feingold and urge them to allow an up and down vote on ALL judicial nominees." J.A. 92. Moreover,

Consideration of such factors would not complicate the inquiry unduly and would significantly reduce the danger that a constitutional exception to BCRA § 203 will facilitate corporate electioneering.

2. Although BCRA's definition of "electioneering communication" is simple and objective, Congress in formulating that definition conducted extensive hearings and considered a wealth of evidence. In identifying the characteristics that would trigger BCRA § 203's financing restrictions, Congress considered the advertising practices used to circumvent pre-BCRA restrictions on corporate electioneering. This Court likewise reviewed a voluminous record before concluding that BCRA's "electioneering communication" provisions are valid on their face.

As those modes of analysis make clear, determining the proper statutory or constitutional rule may involve a complex, multi-faceted inquiry even when the resulting rule itself is simple and objective. Similarly in the present setting, this Court should consider the relevant contextual evidence in determining whether appellee's proposed test for resolving as-applied constitutional challenges (see Appellee Br. 56-57) will adequately prevent circumvention of BCRA's financing restrictions, whether or not the contextual factors described above are ultimately incorporated into any constitutional test this Court may fashion. If the proposed exception would al-

---

other organizations spent significant sums on issue advertising related to judicial filibusters during the spring of 2005. See J.A. 32.

If appellee's ads were intended to affect congressional votes that ultimately did not occur, the fortuitous effect of BCRA § 203's financing restrictions (and of the district court's denial of preliminary injunctive relief, see J.S. App. 57a-71a) was to prevent appellee from wasting corporate funds on a fruitless endeavor. Appellee evidently does not regard the matter in that light, however, since it states (Br. 24) with apparent regret that it "has forever lost the opportunity to broadcast its 2004 grassroots lobbying ads."

low massive circumvention of BCRA and *McConnell*'s overbreadth ruling (which was premised on the statute's constitutionality in the "vast majority" of its applications) through ads that, as contextual factors make clear, were intended to influence a candidate election, then that is reason enough to reject the proposed exception. The contextual factors are thus relevant to rejecting this as-applied challenge even if they are not incorporated into a new as-applied test.

E. Appellee Offers No Sound Reason For This Court To Reconsider *McConnell*

The breadth of appellee's position regarding the circumstances under which as-applied challenges to BCRA § 203 should prevail leads it to the inevitable conclusion that the Court should overrule *McConnell*'s holding that BCRA § 203 is facially constitutional. None of the considerations that support a departure from customary fidelity to precedent warrants dismantling the Court's landmark decision in *McConnell* just three Terms after it was pronounced following an extraordinary sitting. Indeed, appellee makes virtually no effort to explain why *McConnell* should be overruled under "the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500 (2006) (Alito, J., concurring in part and concurring in the judgment). After receiving a 20-page extension from this Court, appellee dedicates less than two pages (Br. 68-69) to its argument that *McConnell* is not entitled to stare decisis effect. That "is reason enough to refuse" appellee's extraordinary request to overrule *McConnell*. *Ibid.*

In sustaining BCRA § 203 against a facial constitutional challenge, the Court in *McConnell* relied on three basic propositions. First, the Court reaffirmed its prior holdings that corporations may constitutionally be prohibited from using

treasury funds for express electoral advocacy. See 540 U.S. at 203. Second, the Court held that the "vast majority" of prior ads covered by BCRA's definition of "electioneering communication" had an "electioneering purpose" and were thus the "functional equivalent" of express advocacy, *id.* at 206, and that any overbreadth in the statute's coverage was therefore insubstantial, see *id.* at 207. Third, the Court held that the alternatives available under BCRA to corporations that wish to engage in issue advocacy but do not intend to influence federal elections are sufficient to allay any remaining constitutional concerns. See *id.* at 206. Appellee has identified no new evidence or other intervening development that casts doubt on any of those propositions. There is consequently no basis for appellee's contention (Br. 62-69) that *McConnell* should be overruled.

Appellee contends (Br. 62) that the government has "call[ed] into question *McConnell*'s facial upholding" of BCRA § 203 by arguing that appellee's ads are in the "*heartland*" of Congress's concern.[9] That is not a legitimate basis to revisit a precedent of this Court, especially one as recent and important as *McConnell*. The arguments of a party —which this Court is free to accept or reject—are simply not the kind of intervening development that could justify overruling a precedent. As we explain above, ads like appellee's that took the form of appeals to viewers and listeners to contact their elected representatives were the paradigmatic

---

[9] Contrary to appellee's suggestion (Br. 62-63), that characterization of appellee's ads in the Commission's opening brief does not reflect a change from the government's prior litigating position. The government's brief in *WRTL I* contended (at 42 n.16) that the timing of appellee's ads "reinforces the inference that [those] advertisements were in the heartland of Congress's concern." Appellee nevertheless failed to urge the overruling of *McConnell* in *WRTL I*, or even in its response to the jurisdictional statements in the current appeals.

abuse at which BCRA's "electioneering communication" provisions were directed. If this Court agrees, then BCRA § 203 is clearly constitutional as applied to those ads, since the Court in *McConnell* held that the provision is not substantially overbroad. If the Court disagrees and concludes instead that appellee's ads are atypical of "electioneering communications" as defined in BCRA, that determination may be a basis for sustaining appellee's as-applied challenge. But either way, neither the government's argument nor the Court's agreement or disagreement with that argument would remotely call into question this Court's prior holding that BCRA § 203 is constitutional on its face.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the three-judge district court as to the claims at issue in these appeals should be vacated on the ground of mootness, and the case should be remanded with instructions to dismiss as to those claims. In the alternative, the judgment should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007